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In the

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-109

HAL FRANCIS RACHAL and EDWARD BARHAM HUNNICUTT,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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I. OPINIONS BELOW

The opinions of the District Court and the Court of Appeals are appended hereto as Appendix "A." The opinion of the Court of Appeals is reported in ..... F. 2d .....

II. JURISDICTION

This is a petition for certiorari to review a decision of the United States Court of Appeals for the Fifth Circuit in Title 28, Section 2255 motions brought in the United States District Court for the Western District of Texas, San Antonio Division,

by Petitioners. The District Court denied the motions without a hearing on the grounds that this Court held in *United States v. Marion*, 404 U.S. 307, 30 L.Ed. 2d 468, 92 S.Ct. 455 (1971) that any pre-indictment delay is safeguarded by the applicable statute of limitations. The Court of Appeals affirmed the order of the Trial Court without a hearing and without an opinion. (Appendix A-4). The decision of the United States Court of Appeals for the Fifth Circuit is dated July 23, 1974. This Court's jurisdiction is invoked under the provision of 28 U.S.C. Section 1254(1).

III. QUESTIONS PRESENTED

1. Whether unreasonable pre-indictment delay by the Securities and Exchange Commission which caused actual prejudice to Petitioners' right to have a fair trial violates the Due Process Clause of the Fifth Amendment to the Constitution of the United States of America.

IV. CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved in this case is:

Due Process Clause of the Fifth Amendment to the Constitution of the United States.

V. STATEMENT

Petitioners' sworn petitions allege:

Joan Saxer, attorney with the Securities and Exchange Commission, in charge of the investigation, decided on October 11, 1968 to recommend Petitioner Rachal for prosecution and decided on December 4, 1968 to recommend Petitioner Hunnicutt for prosecution but did not submit the case to the De-

partment of Justice until June of 1970 and the indictment was returned on June 17, 1970. As the result of such unreasonable pre-indictment delay, material corporate records became unavailable to Petitioners before the trial, resulting in the following charge to the jury:

> "In determining whether a defendant acted in good faith or with the intent to defraud, you should consider all the facts and circumstances in the case that bear upon such issue including * * * the extent, if any, to which he may have altered, fabricated or concealed documents or records in order to conceal the actual facts as you find them; * * *."

Such charge was particularly damaging since each Petitioner was his own principal witness and much of his testimony contradicted evidence introduced by the Respondent.

Also, as a result of such unreasonable pre-indictment delay, Norman Metcalfe Reed, an attorney with the Securities and Exchange Commission who was to be a material witness on behalf of the Petitioners became unavailable to the Petitioners before trial by death on February 25, 1971, one month before the trial commenced.

The Petitioners' motions were denied without an evidentiary hearing. (Appendix A-1)

VI. REASONS FOR GRANTING THE WRIT

The Court of Appeals has decided an important constitutional question in direct conflict with the holding of this Court in *United States v. Marion.*

VII. ARGUMENT

Contested fact issues in Section 2255 cases must be decided

on the basis of an evidentiary hearing, not affidavits. *Montgomery v. United States,* (5 Cir. 1972) 469 F. 2d 148 and cases cited therein. Evidence aliunde the record is admissable in an evidentiary hearing on a 2255 motion at which time the court could determine the materiality of the testimony of a dead witness. A stipulation in the original trial as to what the testimony of such witness would have been would not have removed the prejudice to Petitioners caused by the unavailability of such witness.

The Trial Court based its order denying Petitioners' motions on the following conclusion of law:

> "Any delay occurring between commission of offense and commencement of prosecution is controlled exclusively by the applicable statute of limitations."

In support of such conclusion, the Trial Court cited *Harlow v. United States,* (5 Cir. 1962) 301 F. 2d 361; *United States v. Grayson,* (5 Cir. 1969) 416 F. 2d 1073; and *United States v. Marion,* (1971) 404 U.S. 307.

The *Marion* Case did not so hold and it was later in time than the *Harlow* and *Grayson* cases. The *Marion* opinion stated, in part, as follows:

> "Since appellees rely only on potential prejudice and passage of time between alleged crime and indictment, see Part IV, *infra,* we perhaps need to go no further to dispose of this case, for the indictment was the first official act designating appellees as accused individuals and *that event occurred within the statute of limitations.* Nevertheless, since a criminal trial is likely consequence of our judgment and since appellees may claim actual prejudice to their defense, it is appropriate to note here that *the statute of*

> *limitations does not fully define appellee's rights with respect to events occurring prior to indictment.*" Emphasis added.

Furthermore, this Court reversed and remanded the case and stated that the pre-indictment delay violated the Due Process Clause if there was actual prejudice to the conduct of the defense or if there is a showing that the Government intentionally delayed to gain some tactical advantage over Appellees or to harass them.

This Court, in *Dickey v. Florida* (1970) 398 U.S. 30, 26 L.Ed. 2d 26, 90 S. Ct. 1564, Mr. Jutsice Brennan, in his concurring opinion, states:

> "And public officials responsible for the delay may not even be associated with Law Enforcement Agencies or the Courts. Delay, for example, may spring from a refusal from other branches of government to provide these agencies and the judiciary with resources necessary for speedy trials."

If the Court sees fit to reverse and remand for an evidentiary hearing, it might behoove the Court to instruct the Trial Court on burden of proof.

In *Dickey v. Florida,* Mr. Justice Brennan, in his concurring opinion, states:

> "Thus, it may be that an accused makes out a *prima facie* case of denial of speedy trial by showing that his prosecution was delayed beyond the point at which a probability of prejudice arose and that he was not responsible for the delay, and by alleging that the government might reasonably have avoided it. Arguably the burden should then shift to the government to establish, if possible, that the delay was necessary by showing that the reason for it was sufficiently important to justify the time lost."

In *Smith v. Hooey* (1969) 393 U.S. 374, 384 21 L. Ed. 2d 607, 89 S. Ct. 575, Mr. Justice Harlan, in his concurring opinion states:

> "At trial, if petitioner makes a *prima facie* showing that he has in fact been prejudiced by the State's delay, I would then shift to the State the burden of proving the contrary."

CONCLUSION

The Court of Appeals is in fundamental error in its reading of *United States v. Marion* and in the standard applied in judging Petitioners' Due Process claim. *United States v. Marion* expressly rejected the notion that pre-indictment delay is controlled exclusively by the applicable statute of limitations. As this Court restated its holding in *Barker v. Wingo*, by granting certiorari in *Rocky Moore v. Arizona* (1973) 414 U.S. 25, 38 L. Ed. 2d 183, 94 S. Ct. 190, so also should this Court restate its holding in *United States v. Marion* by granting this petition, for to do otherwise would effectively delete the Due Process Clause of the United States Constitution as interpreted in *United States v. Marion.*

It is respectfully submitted that the Court should grant Petitioners' prayer for Writ of Certiorari.

Respectfully submitted,

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UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

SAN ANTONIO DIVISION

No. SA 73 CA 244

HAL FRANCIS RACHAL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

No. SA 73 CA 243

EDWARD BARHAM HUNNICUTT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ORDER

On this date came on to be considered the motions of Hal Francis Rachal and Edward Barham Hunnicutt, filed pursuant to 28 USC 2255. An examination of each motion, captioned above, reflects that the grounds therefor are identical, one appearing to have been copied from the other. Accordingly, for the purpose of this order the motions will be consolidated and disposed of in one order.

The petitioners were convicted of offenses involving the securities statutes. They were indicted together, were tried to-

gether and were sentenced on June 11, 1971. Their motions set out but one point of error, namely,

> "unreasonable pre-indictment delay by the Securities and Exchange Commission thereby causing actual prejudice to petitioners' right to a fair trial in violation of the due process clause of the Fifth Amendment to the Constitution of the United States of America."

Petitioners each allege that the Securities and Exchange Commission attorney decided on December 4, 1968 to recommend their prosecution, but did not submit the case to the Department of Justice until June of 1970, and the indictments were returned on June 17, 1970. They charge that as a result of such unreasonable delay, material corporate records became unavailable to them before trial, resulting in an unfavorable charge to the jury, which they say was particularly damaging because each petitioner was his own principal witness and much of his testimony contradicted evidence introduced by the Government. They also allege that an attorney for the SEC who was to be a material witness in their behalf became unavailable to them before trial by reason of his death one month before it commenced.

It was urged in *United States v. Marion, 404 U.S. 307 (1971),* where it was defendant's claim that the Government had known of his crimes for over three years prior to his indictment and that the delay was due to indifference or negligence on the part of the prosecutor, that this so prejudiced defendant that his Sixth Amendment rights to a speedy trial were violated. The Court held that the Sixth Amendment applies only after a person has been accused of a crime, in that case by indictment; that any pre-accusation delay is safeguarded by the applicable statute of limitations; and that the defendant had failed to demonstrate any actual prejudice.

It was held in *U.S. v. Grayson 416 F. 2d 1073, 5 Cir. 1969*

that any delay in an indictment does not amount to a violation of the Sixth Amendment, because the statute of limitations is controlling. Citing *U.S. v. Ewell, 383 U.S. 116; Bruce v. U.S., 351 F. 2d 318, 5 Cir. 1965.* This Circuit held in *Harlow v. U.S., 301 F. 2d 361, 1962,* that the right to a speedy trial does not arise until after a prosecution is instituted:

> "Any delay occurring between commission of the offense and commencement of the prosecution is controlled exclusively by the applicable statute of limitations."

Petitioners state that the delay in bringing the case to trial caused them to lose the testimony of a material witness who died a month before the trial started. Nothing is pointed to in the record to indicate that any effort was ever made between petitioners and the Government to stipulate what the testimony of such witness would have been, which leaves this Court completely in the dark as to the nature of any information supposedly possessed by such witness, or its relevancy, or any other facts which demonstrate its supposed materiality.

No merit is found in these motions submitted by petitioners, and it is accordingly

ORDERED that their respective motions be, and the same are hereby in all things, DENIED.

DONE at San Antonio, Texas this 27th day of March, 1974.

/s/ JOHN H. WOOD, JR.

John H. Wood, Jr.
United States District Judge

In the

United States Court of Appeals

For The Fifth Circuit

No. 74-1950
Summary Calendar*

HAL FRANCIS RACHAL and
EDWARD BARHAM HUNNICUTT,
Petitioners-Appellants,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court
For the Western District of Texas

(July 23, 1974)

Before COLEMAN, DYER and RONEY, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

*Rule 18, 5 Cir., Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431 F. 2d 409, Part I.

[1] See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F. 2d 966.

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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the district court should have held an evidentiary hearing on their motions alleging that they had been prejudiced by pre-indictment delay.

Following a jury trial in 1971 in the United States District Court for the Western District of Texas, petitioners were convicted of thirteen counts of conspiracy, mail fraud, sale of unregistered securities, and securities fraud, in violation of 15 U.S.C. 77q(a)(2) and 18 U.S.C. 1341 and 371. Petitioner Rachal was sentenced to concurrent terms of five years' imprisonment on all 13 counts, and was fined $10,000 on count 13. Petitioner Hunnicutt was sentenced to concurrent terms of three years' imprisonment on all 13 counts and was fined $5,000 on count 13. On direct appeal the court of appeals affirmed, 473 F. 2d 1338 (C.A. 5), certiorari denied, 412 U.S. 927.

1. In 1973 petitioners filed motions to vacate their convictions, pursuant to 28 U.S.C. 2255, in the United States District Court for the Western District of Texas. They alleged that the Securities and Exchange Commission attorney investigating their cases had decided on December 4, 1968, to recommend prosecution, but had not submitted their cases to the Department of Justice for prosecution until June 1970. The motions contended that as a result of this delay: (1) corporate records became unavailable, and as a result of the unavailability the trial judge gave an unfavorable charge to the jury; and (2) an attorney for the Securities and Exchange Commission, who was to be a material witness in their behalf, died one month prior to trial. The district court denied relief without holding an evidentiary hearing (Pet. App. A-1 to A-3). The court of appeals affirmed without opinion (Pet. App. A-4).

2. The claim that the district court should not have denied petitioners' motions without an evidentiary hearing is insubstantial.

Petitioners' claim that they were prejudiced by preindictment delay because corporate records became unavailable is similar to a contention made on direct appeal. Petitioners previoulsy asserted that the records were not discovered until after trial, and that their eventual discovery was new evidence requiring a new trial. The court of appeals rejected this claim, holding that the records were "known to [petitioners] during trial and could have been obtained by them through exercise of due diligence." 473 F. 2d at 1344. Petitioners now assert that the records[1] were unavailable be-

[1]The records involved in this Section 2255 motion are apparently the same as the records involved in the direct appeal; petitioners have never asserted that different records are involved.

cause of pre-indictment delay. This is no more than another argument in support of an issue that the federal courts have already resolved against petitioners. Because petitioners are entitled to but a single federal litigation on this point, *Sanders* v. *United States*, 373 U.S. 1, there was no need to hold a hearing.

Petitioners also contend that they were prejudiced by the death, one month before trial, of Norman Reed, an attorney with the Securities and Exchange Commission, who was to be a witness in their behalf. However, petitioners have never indicated the subject of Reed's testimony, what evidence he was expected to give, or how its loss could have hampered their defense at trial. Where, as here, a Section 2255 motion is devoid of any factual basis, but instead consists only of bald legal assertions, a court may deny the motion without a hearing.[2] *Sanders, supra*, 373 U.S. at 19.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1974.

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[2]Petitioners' reliance (Pet. 4) on *Montgomery* v. *United States*, 469 F. 2d 148 (C.A. 5), is misplaced. *Montgomery* ruled that conflicting factual allegations in affidavits must be resolved by an evidentiary hearing. However, because petitioners have not alleged any facts concerning the matters to which the deceased witness would have testified, there is no factual controversy in this case requiring resolution.

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Respondent erroneously assumes that the records involved in the direct appeal are the only records involved in these Section 2255 Motions.

The Trial Court made no such finding. A cursory reading of the original transcript would show that there were others. As a matter of fact, *Respondent's Memorandum* filed in the trial court in opposition to the 2255 motions acknowledges such fact when it states:

> "The original Stock Journal has not been produced to this date."

Petitioners stand ready to prove that *all* missing records would have been available at the trial, but for the unreasonable pre-indictment delay by the Securities and Exchange Commission.

The one case cited by Respondent deals with repeated 2255 motions. The trial court did not base its order on *res judicata* and the courts have uniformly held that *res judicata* does not apply to a collateral attack on the original judgment of convicition and sentence. *Heflin v. U.S.*, 358 U.S. 415, 420.

Respondent's Supplemental Response filed in the trial court in opposition to the 2255 Motions states:

> "There is nothing in the record to indicate that Petioners ever asked for a stipulation as to what the testimony of the witness who died would have been."

Such Supplementary Response made no objection to the allegation in Petitioners' Motions, thus waiving any possible objection. Also the trial court's Order states:

> "Nothing is pointed to in the record to indicate that any effort was ever made between Petitioners and the Government to stipulate what the testimony of such witness would have been, which leaves the Court completely in the dark as to the nature of any information supposedly possessed by such witness, or its relevancy, or other facts which demonstrate its supposed materiality."

Now, for the first time, Respondent takes exception to the allegation in Petitioners' Motions, thus giving Petitioner no opportunity to amend their petitions.

A denial, thus based, would not be on the merits. It would merely be a ruling that Petitioners' pleadings were deficient. *Sanders v. U.S.*, 373 U.S. 1, 19.

Respectfully submitted,

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